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No. 92-5653

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1992

DORSIE LEE JOHNSON,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Writ of Certiorari
To the Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Did the Texas capital sentencing statute unconstitutionally preclude the jury from giving full mitigating effect to the petitioner's youthful age at the time of the offense?

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RESPONDENT'S BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent,[1] by and through the Attorney General of Texas, and files this Brief.

OPINIONS BELOW

The opinion of the *en banc* Court of Criminal Appeals of Texas affirming Johnson's conviction and sentence is published at 773 S.W.2d 322 (Tex. Crim. App. 1989), and is included in

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[1] For clarity, Respondent will be referred to as "the state" and Petitioner Dorsie Lee Johnson as "Johnson".

the Joint Appendix at page 155 *et seq.*[2] The state court's opinion on Johnson's motion for rehearing, delivered May 27, 1992, is not published. JA 178-81.

JURISDICTION

Johnson has invoked the Court's jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Johnson bases his claim on the eighth and fourteenth amendments to the United States Constitution. He challenges the application of Article 37.071 of the Texas Code of Criminal Procedure, which at the time of his trial provided in pertinent part:

> (b) On conclusion of the presentation of the evidence, [at the sentencing phase of a capital murder trial] the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberate-ly and with the reasonable expecta-tion that the death of the decedent or another would result;

[2] Hereafter, the Joint Appendix will be designated by "JA", followed by relevant page numbers. "R." will refer to the record of state trial proceedings, and "Tr." to the trial transcript, with citation to applicable volume and page numbers.

> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, of the deceased.
>
> * * *
>
> (e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death.

TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Johnson was charged by an indictment filed in the 132nd Judicial District Court of Scurry County, Texas, with the capital offense of intentional murder of Jack Huddleston during the course of a robbery. See TEX. PENAL CODE ANN. §19.03(a)(2) (Vernon 1974). On November 12, 1986, a jury found Johnson guilty of capital murder. A separate hearing on punishment ensued, and the jury on November 14, 1986, returned affirmative answers to the two special issues submitted pursuant to article 37.071(b) of the Texas Code of Criminal Procedure. In accordance with Texas law, the trial court assessed Johnson's punishment at death by lethal injection.

Johnson appealed to the Court of Criminal Appeals of Texas, which affirmed the conviction and sentence on June 21, 1989. *Johnson v. State*, 773 S.W.2d 322 (Tex. Crim. App. 1989). JA 155-77. In an unpublished opinion, the state appellate court on May 27, 1992, denied Johnson's motion for rehearing. JA 178-81. This proceeding followed, and, on February 19, 1993, the Court granted Johnson's petition for writ of certiorari. *Johnson v. Texas*, ___ U.S. ___, 113 S. Ct. 1148 (1993); JA 182.

B. Statement of Facts

1. Guilt-innocence phase

In the early morning hours of March 23, 1986, Johnson met Amanda and Janet Miles at Butler's Cafe (also called the Weekend Cafe) in Colorado City, Texas. R. XIV 242-44, 474, 487. He agree to accompany the Miles sisters to Snyder, Texas,[3] where Janet's boyfriend lived. R. 246, 475, 488. Janet arranged for her boyfriend to drive her home and, before leaving, gave a pistol to Amanda with instructions to give it to their mother for safekeeping and to hide it from Johnson. R. 251-52, 475, 488.[4]

According to Johnson's confession, R. 475-76, 488-89, Amanda then suggested that they rob Allsup's, an all-night convenience store in Snyder. Johnson readily assented, and the two agreed to leave no witnesses. After "casing" the store[5] and

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[3] Snyder is approximately 25 miles away from Colorado City.

[4] Janet purchased the gun on March 1, 1986, at the Snyder Pawn Shop. It was a .25 caliber semi-automatic Excam pistol, serial number M148676. R. 244-45, 234-35. Police obtained the pistol from George Miles, Sr., the father of Amanda and Janet, on April 8, 1985.

[5] Laura Fisk and her niece were at Allsup's sometime after 3:00 a.m. on March 23, R. XIV 78-80, and she identified Johnson as being present at the time, R. XIV 95-96.

ascertaining that only one employee was present, Johnson and Amanda left the store, drove around, and formulated a plan. Johnson was to lure the clerk into the cooler while Amanda emptied the cash register. Returning to Allsup's and parking at the side of the building, the pair entered the store. Johnson carried Janet Miles' .25 caliber pistol in the pocket of his jacket. Once inside the store, they made a pretense of selecting transmission fluid and, when another man entered the store,[6] lingered in the dairy section at the rear of the store. During this time, Johnson noticed that there were no gallon containers of orange juice on the shelves, and he saw a way to get the store clerk, Jack Huddleston, into the cooler as planned.

When the other customer departed, Johnson asked Huddleston whether there was any orange juice in gallon jugs, and, because none was on the shelves, Huddleston went to the walk-in cooler to check. Johnson followed and, once inside the cooler, pulled out the gun and announced the robbery. Huddleston put his hands up over his head. Johnson ordered him to lie face down on the floor, and Huddleston complied. As Huddleston lay on the floor, with his hands still positioned over his head, Johnson shot him once in the back of the neck. In accordance with their plan, Amanda emptied the cash registers of approximately $160[7] while Johnson was eliminating the witness. Each grabbed a carton of cigarettes on the way out. R. XIV 477-78, 491-92.

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[6] V.L. Buchanan was this other customer. He testified that he went to Allsup's at approximately 4:10 a.m. on March 23, 1986, as he did almost every day, in order to purchase a newspaper and cigarettes. R. XIV 115-16.

[7] There was no currency in either cash register. Randy Bates, area supervisor for Allsup's, performed a cash audit and found the registers approximately $160 short. R. XIV 191-93. This is consistent with company policy, under which night-time employees were to periodically place cash in excess of $150 in a "drop safe." R. XIV 275-76.

Rozel Huntsman stopped by Allsup's at approximately 4:30 a.m. on March 23, within minutes of the crime. She was in the process of delivering newspapers on her regular route and needed transmission fluid. R. XIV 129-31. Seeing no one inside the store, Huntsman called out. No one responded. R. XIV 132. Huntsman finally left the store after placing the two pints of transmission fluid she had selected on the check-out counter next to other items. R. XIV 133. Huntsman recalled seeing a Sunday newspaper, bottles of transmission fluid, and either matches or cigarettes on the counter. R. XIV 135-36. A short time later, between 4:30 and 4:40 a.m., Diana Allen discovered Huddleston's body and called the police. R. XIV 21-35.

At the scene of the crime, officers recovered physical evidence that connected Johnson to the crime. Inside the cooler, near Huddleston's head, Sergeant Whittenburg found a .25 caliber casing or hull under shelving.[8] R. XIV 66-69, 166-74. Ballistics tests revealed that this casing was fired from Janet Miles' gun. R. XIV 398. On the check-out counter, police found five pints of Valvoline transmission fluid,[9] a Sunday "Snyder Daily News" paper, and six books of paper matches. R. XIV 290, 297. All items were processed for fingerprints, and Johnson's prints were found on two of the plastic bottles of transmission fluid. Amanda Miles' fingerprint was found on one of the books of matches. R. XIV 344-46, 353-54. Consistent with Johnson's confession that he killed the deceased while Amanda cleaned out the registers, her footprint was found behind the checkout counter. R. XIV 149, 155-64, 222-24, 229-30.

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[8] The location of the bullet casing is consistent with being ejected from the gun while Johnson was standing at Huddleston's feet. R. XIV 71-73.

[9] Allsup's carried only one brand of transmission fluid. There were, however, two different types, one designed for Ford vehicles and the other designed for General Motors vehicles. R. XIV 303. The five bottles of transmission fluid on the counter included both types. R. XIV 186.

An autopsy revealed that Huddleston died from brain damage caused by a bullet wound. R. XIV 375. The bullet entered the back of Huddleston's neck, passed through the brain stem (which connects the brain to the rest of the body), and traveled through the brain until it struck bone. R. XIV 371-72. This path, along with an absence of powder marks on the deceased's skin or shirt, was consistent with Johnson having stood at Huddleston's feet when shooting him. R. XIV 374-75. In addition, ballistics tests showed that rifling marks on the .25 caliber slug removed from Huddleston's head during the autopsy were consistent with rifling marks made by Janet Miles' semi-automatic pistol. R. XIV 371, 394-97.

Later in the day of March 23, Johnson showed his share of the loot to his brother-in-law, Donald Ray Robinson. He told Robinson that he obtained the money from a robbery of Allsup's convenience store that he committed with Amanda Miles. When Robinson cautioned that he could be identified, Johnson laughed and said, "A dead man can't talk." R. XIV 418-19.[10]

2. Punishment phase

At the punishment phase, the state introduced evidence that Johnson's violent conduct was not limited to the capital offense. Approximately one week later, on the night of March 29, 1986, Johnson became involved in an argument at Shakey's Pizza Parlor in Snyder. As the other man involved drove away in a pickup, Johnson twice shot at him. He later bragged about the incident, laughing about how the man had to hunch down in the truck. R. XV 218-19, 231-39.

On April 8, 1986, less than three weeks after shooting and killing Jack Huddleston during a robbery, Johnson committed another armed robbery. This time assisted by George

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[10] While in jail pending trial, Johnson told another prisoner, Edward Ramshur, that he killed Huddleston pursuant to a plan to eliminate witnesses. R. XIV 434.

Miles, Jr., Amanda's brother, Johnson brutally attacked and robbed Don Burrus, the proprietor of a small grocery store in Colorado City. During the course of this robbery, Johnson shot Burrus in the face[11] and hit Burrus in the head with a wooden-handled hoe, breaking the handle. R. XV 291, 333. George Miles, Jr., stabbed Burrus in the back, leaving a wound four inches deep. R. XV 273, 333. Johnson correctly observes that "[t]hese wounds were not fatal." Petitioner's Brief at 7. Don Burrus did not die from his injuries but, as a result, required care twenty-four hours a day in a nursing home.

At the time he committed these crimes, Johnson was on adult felony probation stemming from his 1985 conviction of burglary in Waco, Texas. R XV 92-96. John Bahlmann, Johnson's probation officer, testified that on two occasions Johnson admitted using marijuana, which was a violation of the terms of his probation. Bahlmann attempted to work with Johnson so that probation would not be revoked, but Johnson was uncooperative and showed no inclination to comply with the conditions of his probation. R. XV 109-14.

Paula Williams and Beverly Jackson, two of Johnson's friends, also testified about his use of illegal drugs, including cocaine and marijuana. In addition, they described instances of Johnson's violent behavior. In March of 1986, Johnson threatened Williams and Jackson with an axe. R. XV 140-42, 152-56. On another occasion in March, he punched Jackson in the head and threw a large rock at her. R. XV 162-67. On the same day he shot, beat, and robbed Don Burrus, Johnson brandished a pistol and pointed it at Jackson. R. XV 171-75. Johnson's violence did not begin in March 1986, however; Williams testified that the previous summer, she saw a gun

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[11] The bullet struck just below Burrus' left eye socket and split into two pieces; one piece lodged at the base of Burrus' skull and the other went out his ear. R. XV 271.

knocked out of Johnson's hand during a fight. R. XV 138-39. Johnson had a bad reputation in the community for being a peaceful and law-abiding citizen. R. XV 142-44.

Johnson had exhibited violent and criminal behavior and refused to follow rules for some time. In December 1982, Johnson and Doug Smith burglarized CC Athletics in Snyder. R. XV 74-77, 83-84. Even as a student at Colorado City Schools in 1979 and 1980, Johnson hurt others. He grabbed Rocky Salazar around the neck and cut Salazar's back with a broken bottle; the wound required stitches. R. XV 7-10, 37. He stabbed another student in the hand with a pencil after making stabbing motions at that student's stomach. R. XV 42. Thereafter, Johnson cut Fred Dakan's leg with broken glass and, when Dakan asked why Johnson did this, responded by slashing Dakan's other leg. R. XV 15-16, 43-44.

In mitigation, Johnson presented the testimony of his father, Dorsie Johnson, Sr., who described his son's background and character. Johnson was raised in a Christian home and regularly attended church. R. XV 345-47, JA 11-14. He had a normal childhood, made friends, and participated in extracurricular sports activities. R. XV 350, 358-59, JA 16, 24.[12] Johnson's parents separated in 1980, and his mother moved to Waco. She died in October of 1984 following a stroke. R. XV 345, 348-49, JA 12, 14-15. According to Mr. Johnson, Johnson was devastated by the death of his mother and the murder of his sister approximately one year later. R. XV 354-57, JA 20-23.

Respecting youth as a mitigating factor, Mr. Johnson testified that Johnson was nineteen years old. He attributed

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[12] Mr. Johnson characterized Johnson's problems at school as "prankishness" and explained that the violent incidents were accidental and unintended consequences of such pranks. He also testified that the injuries were minor, and Johnson remained friends with the other students. R. XV 349-53, 384, JA 15-19, 46.

Johnson's criminal conduct to the influence of drugs and bad friends. According to Mr. Johnson, the drugs altered his son's reasoning and control, making him a different person. He opined that Johnson would change again if he were incarcerated and removed from these influences. R. XV 360-63, JA 25-28. "[L]ock him up, get him away from the environment and these habits and he could be a different person." R. XV 36, JA 26. "[H]e got the background and what it takes to be a decent person. Now, he's had both sides of it. He knows what it takes to make him a different person." R. XV 362, JA 27.

According to Mr. Johnson, nineteen is a "foolish age" when young men are "trying to step into manhood." R. XV 362, JA 27. He opined that young people do not evaluate right and wrong in the same manner that an older person would, or take into consideration the same factors. R. XV 385-86, JA 47-48. Drug use breaks down resistance, so that one acts impulsively and without time to evaluate the circumstances. R. XV 385-86, JA 47-48. Drugs also make one lose "the value of things," and Mr. Johnson believed his son would value life differently if he were sentenced to life imprisonment. R. XV 386, JA 48. If credited, Johnson's evidence showed that he was remorseful and had learned appropriately from his mistakes. Mr. Johnson testified that Johnson told him, "Daddy, I wish I could change it. I wish it never had happened. I wish I had listened more closely to what you said and the way I was raised. I just got off, got into that stuff. It got the best of me.'" R. XV 365, JA 30.

In rebuttal, Mike Bailey, a former deputy sheriff who had been assigned to the Scurry County Jail, testified that Johnson was a discipline problem. Johnson refused to comply with rules and orders. R. XV 390-93. On one occasion, Johnson told Bailey that he was going to get out of jail one of these days and, when he did, he was going to get Bailey. R. XV 391.

SUMMARY OF ARGUMENT

The Court has accommodated the competing requirements of the eighth amendment by recognizing the "simple and logical difference between rules that govern what factors the jury must be permitted to consider in making the sentencing decision, and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Saffle v. Parks*, 494 U.S. 484, 490 (1990). This distinction is reflected in both the nature of the defendant's right to individualized sentencing and the standard for review of claims of inadequate sentencer consideration of mitigating evidence.

The defendant's right to an individualized sentencing is preserved by constitutional "rules that govern what factors the sentencer must be permitted to consider in making the sentencing decision." *Id.* Under *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), the sentencer must be permitted to consider constitutionally relevant evidence about the defendant's background and character and the circumstances of the offense. As a corollary, relevant evidence must be permitted to affect the sentencing decision in a mitigating fashion. *Id.* at 608. Thus, the state may not exclude constitutionally relevant evidence from the sentencing decision, or place it beyond the jury's effective reach by precluding the jury from giving it mitigating weight on the ultimate sentencing issues. *Graham v. Collins*, ___ U.S. ___, ___, 113 S. Ct. 892, 902 (1993). In *Penry v. Lynaugh*, 492 U.S. 302 (1989), for example, a substantial mitigating aspect of Penry's retardation, his inability to learn from mistakes, had minimal relevance to the first and third special issues; because the condition was permanent, it could be given only aggravating effect under the future dangerousness issue.

Beyond assuring that the state's sentencing inquiries do not preclude the jury from considering relevant evidence, the eighth amendment does not govern "how the State may guide the jury in considering and weighing those factors in reaching a

decision." *Saffle v. Parks*, 494 U.S. at 490. This area remains the province of the states. Such latitude is warranted by considerations of federalism. The state legislature is best situated to perceive the values and concerns of its citizens and, in light of the state's particular history of administering capital punishment, to embody those values in procedures designed to reduce arbitrariness and caprice. Additionally, individualized sentencing is intended to further, rather than undermine, the goal of rationality. *Woodson v. North Carolina*, 428 U.S. 280, 302-03 (1976) (joint opinion of Stewart, J., joined by Powell and Stevens, JJ.). Even after the constitutional minimum of narrowing has been accomplished, therefore, the state may "structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde v. California*, 494 U.S. 370, 377 (1990), quoting *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988) (plurality opinion). And, because virtually every such effort limits how the sentencer may consider mitigating evidence and is subject to challenge as preventing the jury from giving enough effect to mitigating evidence, the Court should expressly hold that the eighth amendment does not regulate this area.

Where evidence is not actually excluded from the sentencing decision, the appropriate standard of review is whether there is a "reasonable likelihood" that the jury interpreted its instructions to prohibit consideration and weighing of relevant evidence. *Boyde v. California*, 494 U.S. 370, 379-80 (1990); *Estelle v. McGuire*, ___ U.S. ___, 112 S. Ct. 475, 482 & n.4 (1991). Here, the Court of Criminal Appeals correctly rejected Johnson's claim that the jury was precluded from giving effect to relevant evidence pertaining to his relative youth. All general attributes of "youth" identified by Johnson--impulsiveness, susceptibility to influence, and immature judgment and perspective--can be considered and given mitigating weight under Texas' special issues. Indeed, to the extent such evidence is constitutionally relevant, in that it bears on traditional sentencing concerns, it is equally relevant to the special issues in a mitigating fashion. If the jury believes the

crime is attributable to youthful impulsiveness, that factor militates against an affirmative answer to the deliberateness issue. Further, to the extent criminal conduct is attributable to any of these aspects, including poor judgment and impulsiveness, it also indicates that the defendant will not pose a future danger. The disabilities associated with youth are mitigating because a young person may not have had the opportunity, through life experience, to develop a mature judgment. Just as youth necessarily ends, so do any associated limitations, and society therefore expects young people to learn from their mistakes and their experience.

In the present case, no evidence was excluded from the jury's consideration. Johnson's evidence about his relative youth, as proffered at trial, was within the jury's effective reach, and defense counsel freely argued its mitigating relevance to the special issues. Consistent with the punishment-phase instructions, the jury was free to accept that Johnson's violent conduct was uncharacteristic, instead reflecting the influence of drugs and bad friends; that his background and character showed he would change when away from such influences; and that he had learned appropriately from his mistakes. The greater the role any proffered attributes of Johnson's youth played in his criminal conduct, the greater its mitigating relevance to the special issues submitted to the jury, particularly the second issue. There is no reasonable likelihood that the jury interpreted its instructions to unconstitutionally preclude it from considering and giving mitigating weight to Johnson's evidence when deciding the punishment issues. Because the jury was provided with a vehicle by which to give mitigating effect to Johnson's evidence, he was afforded the individualized sentencing guaranteed by the eighth amendment. Beyond this, he merely quarrels with how Texas guided that consideration--a claim that does not provide a basis for reversal under the eighth amendment.

ARGUMENT

I. THE COMPETING COMMANDS OF THE EIGHTH AMENDMENT ARE RECONCILED BY DISTINGUISHING RULES THAT GOVERN WHAT THE JURY MUST BE PERMITTED TO CONSIDER AND RULES THAT GOVERN HOW THE STATE MAY GUIDE THAT CONSIDERATION.

The dual requirements of the eighth amendment that govern administration of capital punishment are easy to identify but difficult to reconcile. First, a state's capital sentencing scheme must suitably direct and limit a sentencing jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); see also *Furman v. Georgia*, 408 U.S. 238 (1972). Second, "consideration of the character and record of the individual offender and the circumstances of the particular offense [is] a constitutionally indispensable part" of the capital sentencing process. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (joint opinion); see also *Lockett v. Ohio*, 438 U.S. at 604. Writing for the *Lockett* plurality in 1978, Chief Justice Burger stated:

> The signals from this Court have not . . . always been easy to decipher. The States now deserve the clearest guidance that the Court can provide; we have an obligation to reconcile previously differing views in order to provide that guidance."

id. at 602. Fifteen years later, the states, no less than this Court, "struggl[e] to harmonize [the] two competing commandments of the Eighth Amendment." *Graham v. Collins*, ___ U.S. ___, 113 S. Ct. 892, 898 (1993). The burden of compliance with these commands, however, falls squarely upon the states. Concomitantly, only the states bear the significant costs associated with any misinterpretation of the constitutionally permissible ways in which the competing mandates may be accommodated and reconciled.

Johnson claims that Texas' special sentencing issues were unconstitutionally applied in his case because they prevented the jury from giving adequate mitigating effect to evidence of his relative youth of nineteen years at the time of the offense. In this case, the Court should reaffirm that the states may, in promoting the rational administration of capital punishment, structure sentencer consideration of mitigating evidence so long as they do not "limi[t] the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all." *McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring). Such a rule would provide guidance to the states and to reviewing state and federal courts by meaningfully reconciling the competing constitutional mandates. In addition, it would continue to afford the states "their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990). Finally, with one exception, it would harmonize all of this Court's decisions respecting the requirement of sentencer consideration of mitigating evidence--including *Penry v. Lynaugh*, 492 U.S. 302 (1989), its precursors, and its successors. That sole exception is the sweeping and expansive construction of *Penry* advocated by Johnson and almost every death-sentenced capital murderer in Texas who seeks to overturn his or her sentence. To the extent that *Penry* lends itself to such an interpretation, it is incompatible

with the body of the Court's eighth amendment jurisprudence and should be rejected categorically.[13]

A. The states are allowed wide latitude in guiding how the jury may consider mitigating evidence.

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Court held that then-existing death penalty statutes violated the eighth and fourteenth amendments. Of the five-justice majority, the three justices who were unwilling to hold capital punishment *per se* unconstitutional found that standardless sentencing discretion created a risk of discriminatory application, *id.* at 250 (Douglas, J., concurring), permitted the penalty to be wantonly and freakishly imposed, *id.* at 310 (Stewart, J., concurring), and provided no meaningful basis to distinguish the few cases in which the death penalty was imposed from the many in which it was not, *id.* at 313 (White, J., concurring). To comply with the mandate of *Furman*, a state must, at a minimum, "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more serious sentence on the defendant compared to others found guilty of murder."

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[13] The Court in *Graham v. Collins* noted that it did not construe *Penry* so broadly, because such a construction is incompatible with Penry's own holding that it did not announce a "new rule" of law. *Id.*, ___ U.S. at ___, 113 S. Ct. at 901. The rule of *Penry* is the holding that is consistent with *Teague v. Lane*, 489 U.S. 288 (1989), regardless whether that rule is applied to cases on direct or collateral review.

The *Graham* Court also declined to "read *Penry* as effecting a sea change in this Court's view of the constitutionality of the former Texas death penalty statute; it does *not* broadly suggest the invalidity of the special issues framework." *Graham v. Collins*, ___ U.S. at ___, 113 S. Ct. at 901 (emphasis in original). To the extent this statement is *dicta*, it should be made a holding in the present case. Further, assuming *arguendo* that an expansive interpretation of *Penry* is binding under the doctrine of *stare decisis*, that broad interpretation should be overruled expressly.

Zant v. Stephens, 462 U.S. 862, 877 (1983). The fact that narrowing has been accomplished does not mean, however, that the state has no interest in promoting rationality and predictability in capital sentencing. Rather, "[s]tates are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde v. California*, 494 U.S. at 377, quoting *Franklin v. Lynaugh*, 487 U.S. at 181.

There is, accordingly, more than one way in which the eighth amendment may be satisfied. While a capital sentencing scheme may not be applied to preclude the sentencer from considering relevant mitigating evidence, the states remain free to guide that consideration. This latitude is grounded in considerations of federalism.

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.

Schad v. Arizona, 501 U.S. ___, ___, 111 S. Ct. 2491, 2500 (1991) (citation omitted); see also *Engle v. Isaac*, 456 U.S. 107, 128 (1982) ("The states possess primary authority for defining and enforcing the criminal law."). In guiding capital sentencing discretion, the state, "representing organized society," identifies the factors that it "deems particularly relevant to the sentencing decision." *Gregg v. Georgia*, 428 U.S. at 192 (joint opinion). State legislatures are best situated to understand the factors that its citizens deem significant and, concomitantly, to formulate sentencing procedures that incorporate and reflect those concerns. See *Skipper v. North Carolina*, 476 U.S. 1, 15 (1986) (Powell, J., joined by the Chief Justice and Rehnquist, J, concurring in judgment). Likewise, because each state has had

its own unique experience in the administration of capital punishment, state legislatures have responded to the mandate of *Furman* in a variety of ways. "The fact that other States have enacted different forms of death penalty statutes which also satisfy constitutional requirements casts no doubt on Pennsylvania's choice. Within the constitutional limits defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder will be punished." *Blystone v. Pennsylvania*, 494 U.S. at 309.

The Court has recognized that the state "need not grant the jury the choice to make the sentencing decision according to its own whims or caprice." *Saffle v. Parks*, 494 U.S. at 493; see also *Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("it is of vital importance . . . that any decision to impose the death sentence be, and appear to be based on reason rather than caprice or emotion"). Indeed, it was on this basis that the Court twice held it permissible to instruct the jury that its verdict may not be founded on feelings of sympathy. *Saffle v. Parks*, 494 U.S. at 492; *California v. Brown*, 479 U.S. 538, 542 (1987). In rejecting Parks' claim that such instruction prevented the jury from giving effect to his evidence, because the evidence tended to evoke sympathy, the Court reasoned that: "[t]his argument misapprehends the distinction between allowing the jury to consider mitigating evidence and guiding their consideration." *Saffle v. Parks*, 494 U.S. at 492. "The objectives of fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord in a juror." *Id.* at 495.

Likewise, the Court has approved a variety of state-imposed limitations on *how* the sentencer may give effect to mitigating evidence. The state may place upon the defendant the burden of proof and persuasion on the ultimate sentencing decision. Arizona's capital sentencing scheme, for example, did

not allow the sentencing judge to impose a life sentence unless the defendant established by a preponderance of the evidence the existence of mitigating factors "sufficiently substantial to call for leniency." *Walton v. Arizona*, 497 U.S. 639, ____, 110 S. Ct. 3047, 3055 (1990).[14] Additionally, a capital defendant is not constitutionally entitled to an "independent" vehicle by which the jury can measure her culpability and opt against the death penalty on that basis. Rather, once constitutionally mandated narrowing is accomplished, the state may *require* the sentencer to impose the death penalty unless the defendant proves the existence of a mitigating factor. *Blystone v. Pennsylvania*, 494 U.S. at 306-09 & n.4.

The latitude reflected by this line of cases is particularly warranted in this context. Compliance with the two general requirements of the eighth amendment, which are at the very least in tension, invariably subjects the state's capital-sentencing scheme to challenge as providing either *too much* discretion to impose the death penalty or *too little* discretion to decline to impose it. With increasing frequency, death sentences are simultaneously attacked on both grounds. *E.g.*, *Earhart v. Texas*, No. 92-8105 (pending on petition for writ of certiorari); *Walton v. Arizona*, 497 U.S. at ___, 110 S. Ct. at 3055-58.

Even where a defendant's evidence plainly possesses mitigating relevance to the sentencing inquiries provided by the

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[14] Johnson argues that such limitations merely require "jurors to confirm that evidence of a particular mitigating circumstance is in fact substantial before they proceed to the essentially moral judgment of whether it lessens the defendant's culpability and thus makes death an inappropriate sentence." Petitioner's Brief at 20. No such dichotomy exists, however. In *Walton*, for example, it is the sentencer's determination that mitigating factors are or are not substantial that represents its moral judgment about the defendant and his conduct. *Id.*, 497 U.S. at ___, 110 S. Ct. at 3051-53. In Texas, similarly, the jury's moral judgment is made in weighing the evidence and deciding whether a reasonable doubt exists on any special issue.

state, it routinely is asserted that the jury could not give *enough* mitigating effect to his evidence. *E.g.*, *Blystone v. Pennsylvania*, 494 U.S. at 308 (claiming that modifiers used in enumerated mitigating factors--such as the defendant acting under "extreme" duress or being "substantially" impaired from appreciating the consequences of his conduct--precluded the jury from considering lesser degrees of duress or impairment); *Walton v. Arizona*, 497 U.S. at ___, 110 S. Ct. at 3055-56 (claiming, *inter alia*, that defendant's burden of proving, by a preponderance of the evidence, mitigating factors sufficiently substantial for leniency, unconstitutionally precluded the sentencing judge from giving effect to mitigating evidence). However, because virtually every objective sentencing criterion adopted to "achieve a more rational and equitable administration of the death penalty" limits *how* the sentencer may give effect to mitigating evidence, the Court has recognized, and should continue to recognize, the "simple and logical difference between rules that govern what factors the jury must be permitted to consider in making the sentencing decision, and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision."[15] *Saffle v. Parks*, 494 U.S. at 490. The eighth amendment guarantee of individualized sentencing is protected by the former; the latter remains the province of the states.

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[15] This distinction is also reflected in cases pertaining to aggravating factors that are used in balancing states. Once the state has performed the constitutional minimum of narrowing, the Court has focused on *what* the jury was permitted to weigh. Where the sentencer's reliance on a vague aggravating factor impermissibly adds to the factors the sentencer may weigh against mitigation, the eighth amendment is violated. *E.g.*, *Stringer v. Black*, ___ U.S. ___, ___, 112 S. Ct. 1130, 1137 (1992). Where the evidence could have been weighed by the sentencer in any event, and the vague factor is not necessary to accomplish narrowing, there is no eighth amendment violation. *Zant v. Stephens*, 462 U.S. at 890.

B. The eighth amendment governs what mitigating evidence the sentencer must be permitted to consider.

1. Individualized sentencing is intended to further, rather than undermine, rationality in capital sentencing.

The Court in *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (joint opinion), provided three explanations for the eighth amendment requirement of individualized sentencing in capital cases. First, legislative enactments reflected that complete elimination of individualized sentencing would mark a departure from contemporary standards respecting administration of capital punishment. Prior to *Furman*, most states had eschewed mandatory death penalty statutes; and, even in the wake of *Furman*, the vast majority of the states did not abandon individualized sentencing but, rather, adopted some form of "guided discretion" sentencing scheme. *Id.*, 428 U.S. at 288-301.

Second, individualized sentencing furthers *Furman*'s requirement that states adopt capital-sentencing schemes that reduce the risk of arbitrary and capricious imposition of the death penalty. Given the inherently moral nature of a decision whether to impose the death penalty, juries necessarily will exercise a measure of discretion when they make that decision. A statute that makes the death penalty automatic upon a defendant's conviction of an aggravated murder merely shifts unbridled discretion from the punishment phase to the guilt-innocence phase of the trial. *Woodson*, 428 U.S. at 302-03. Far from guiding the jury's exercise of sentencing discretion, such a scheme is likely to promote arbitrariness in the sentencing decision. *Id.* at 303; *Roberts (Stanislaus) v. Louisiana*, 428

U.S. 325, 334-35 (1976); see also *Hopper v. Evans*, 456 U.S. 605, 611 (1982). Additionally, under a scheme that absolutely prevents the jury from considering aspects of the individual offender and offense, the jury may be tempted to exercise its inevitable discretion based on irrational or impermissible generalizations, including class and race. *Graham v. Collins*, ___ U.S. ___, 113 S. Ct. at 907 (Thomas, J., concurring).

The third rationale for individualized sentencing is "the fundamental respect for humanity underlying the Eighth Amendment". *Woodson*, 428 U.S. at 304. A scheme that permits *no* individualized sentencing "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Id.* Thus, while provision of individualized sentencing remains a policy choice in non-capital cases, *Harmelin v. Michigan*, 501 U.S. ___, ___, 111 S. Ct. 2680, 2701-02 (1991), it is a necessary component of a constitutional capital-sentencing scheme.

Although respect for the unique humanity of the defendant may serve to explain why society's traditional sentencing concerns are weightier where death is a possible penalty--that is, why the state may not eliminate individualized sentencing--it does not itself provide a rational sentencing criterion. No capital defendant is any more or less a "uniquely individual human being" than any other capital defendant. To hold that a capital sentencing decision must be permitted to hinge on the vagaries of a jury's respect for the defendant's unique humanity, or for qualities that are somehow redeeming, would require a return to the unfettered discretion condemned in *Furman*. At the very least, such a decision would be, like one based upon the individual sensitivities of individual jurors, "very difficult" to reconcile with the Court's "long-standing recognition that, above all, capital sentencing must be reliable, accurate, and non-arbitrary." *Saffle v. Parks*, 494 U.S. at 493. This rationale, thus, serves only to explain why there appears to be no definition

of capital murder that is sufficiently aggravated to justify elimination of individualized sentencing. *E.g.*, *Sumner v. Shuman*, 483 U.S. 66 (1987) (murder committed while defendant serving sentence of life without possibility of parole); *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977) (per curiam) (murder of a policeman); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976) (joint opinion) (first degree murder).

In explaining why aspects of a capital defendant's background and character and the circumstances of the crime have relevance at sentencing, the Court repeatedly has referred to society's basic rationales for the criminal law. In capital cases, as in non-capital cases, individualized sentencing serves society's basic interests in retribution (punishing the individual for his misdeeds), deterrence (preventing similar future conduct by the person convicted and others),[16] and rehabilitation (restoring the convict to a useful and productive place in society). See *Gregg v. Georgia*, 428 U.S. at 183-87 (joint opinion of Stewart, Powell, and Stevens, JJ.). These considerations, which as a matter of public policy led to a prevailing practice of individualized sentencing in non-capital cases, attain sufficient weight in the context of capital punishment that individualized sentencing is constitutionally required. *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (plurality opinion), citing *Williams v. New York*, 337 U.S. 241 (1949).

Future dangerousness, for example, is a constitutionally recognized sentencing consideration because it corresponds to the rehabilitation, deterrence, and, and retribution rationales. See *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986); *Barefoot v. Estelle*, 463 U.S. 880, 897 (1983); *Boyde v. California*, 494

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16 Although general deterrence is a punishment rationale, the issue obviously is not part of an *individualized* sentencing decision. As Justice Stewart observed in *Gregg v. Georgia*, "[t]he value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures." *Id.*, 428 U.S. 153, 186 (1976) (opinion of Stewart, J., joined by Powell and Stevens, JJ.).

U.S. 370, 382 n.5 (1990). In deciding this issue, a jury effectively considers the defendant's prospects for rehabilitation to the point of living non-violently, whether a life sentence is sufficient to specifically deter the individual defendant from committing criminal acts of violence, and whether the defendant's criminal conduct is an aberration or the product of transitory conditions. The defendant's crime, culpability, background, and character all possess obvious relevance to this inquiry.

Likewise, culpability is constitutionally recognized because it relates to the retribution rationale for punishment. *Tison v. Arizona*, 481 U.S. 137, 149 (1987). In *Enmund v. Florida*, 458 U.S. 782, 800 (1982), the Court stated:

> [a]s for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability--what Enmund's intentions, expectations, and actions were. . . .

The question "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result" obviously and directly addresses this primary measure of culpability.

To the extent a defendant's culpability for the offense may be a function of proffered aspects of his character and background that are irrelevant to his intentions, expectations, and conduct at the time of the offense, it must be because the crime is to some degree attributable to those factors.

> [E]vidence about the defendant's background and character is relevant *because of the belief, long held by this society*, that defendants who commit

> criminal acts that are *attributable* to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. . . . Thus, the sentence imposed at the penalty phase should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.

California v. Brown, 479 U.S. at 545 (O'Connor, J., concurring) (first and second emphases added, third emphasis in original); *Penry v. Lynaugh*, 492 U.S. at 319. Likewise, the proffered factors must be ones that society traditionally has viewed as lessening a defendant's culpability or responsibility for his criminal conduct. Absent either element, the proffer of evidence merely constitutes an appeal to sympathy or an invitation to dispense mercy based on nothing more substantial, or rational, than the degree of respect the jury believes the defendant's unique humanity deserves. Nothing in the Court's precedent indicates that it intends or desires this effective return to unbridled discretion. Both transitory conditions to which the crime was attributable and factors proffered to show the crime was an aberration have mitigating relevance to the future dangerousness issue. See *Graham v. Collins*, ___ U.S. at ___, 113 S. Ct. at 902; *Boyde v. California*, 494 U.S. at 382 n.5 (evidence of positive character in the face of disadvantages may extenuate the gravity of the crime by showing it to be an aberration).

2. The rule of *Lockett* establishes that the state may not exclude constitutionally relevant evidence or prevent the sentencer from giving it any mitigating weight.

The rule of *Lockett v. Ohio* represents the Court's effort to reconcile *Furman*'s mandate that capital-sentencing procedures be tailored to reduce the risk of arbitrary and capricious imposition of the death penalty with the subsequent mandate of *Gregg* and its companion cases that capital-sentencing proceedings provide for consideration of the particular offense and offender. The plurality undertook to explain "which facets of an offender or his offense it deemed 'relevant' in capital sentencing [and] what degree of consideration of 'relevant facets' it would require". *Id.*, 438 U.S. at 604, quoting *Woodson v. North Carolina*, 428 U.S. at 304. It concluded:

> [T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett, 438 U.S. at 604 (emphasis in original). *Lockett* delineates *what* potentially mitigating evidence is constitutionally relevant at capital sentencing. *Id.* As a corollary, it requires that the state permit constitutionally relevant evidence to affect the sentencing decision in a mitigating fashion. *Id.* at 608. It does not, however, purport to dictate how the sentencer must

consider mitigating evidence. *Saffle v. Parks*, 494 U.S. at 490-91.

Applying the rule of *Lockett*, the Court has considered *whether*, not *how*, the jury could give mitigating effect to relevant evidence. *Saffle v. Parks*, 494 U.S. at 490. Potentially mitigating evidence about a defendant's background and character and the circumstances of the offense may not be excluded from the sentencing determination. *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (sentencing judge refused to consider, as a matter of law, defendant's non-statutory mitigating evidence and instructed jury to consider only enumerated mitigating factors); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (trial court refused to admit, as irrelevant, defendant's proffered evidence of good behavior and adjustment to life in prison); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (sentencing judge believed state law prohibited him from considering and weighing evidence of 16-year-old defendant's violent family history). Likewise, the state may not "limi[t] the inquiries to which is it relevant so severely that the evidence could not be part of the sentencing decision at all." *McKoy v. North Carolina*, 494 U.S. at 456 (Kennedy, J. concurring); see *Lockett v. Ohio*, 438 U.S. at 608 (virtually all mitigating aspects of the offender and her offense were irrelevant to the three narrow mitigating circumstances). These decisions do not stand for the proposition that evidence is constitutionally mitigating merely because the defendant proffers it. Rather, they reflect that only in the rarest of cases will evidence about a defendant's background, character, and crime have so little bearing on traditional concerns that it may be removed entirely from the sentencing decision.

While *Lockett* governs the mitigating factors the jury must be permitted to consider in making its sentencing decision, the Court never has promulgated "rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Saffle v. Parks*, 494 U.S. at 490. The Constitution does not require the states to provide every

conceivable vehicle by which the sentencer may "give effect" to the defendant's proffered evidence, *Boyde v. California*, 494 U.S. at 382-86 & n.5. Neither *Lockett* nor *Eddings* "establishes the weight which must be given to any particular mitigating evidence, or the manner in which it must be considered; they simply condemn any procedure in which such evidence *has no weight at all*." *Barclay v. Florida*, 463 U.S. 939, 961 n.2 (1983) (opinion of Stevens, J., joined by Powell, J., concurring in the judgment) (emphasis added); see also *Eddings v. Oklahoma*, 455 U.S. at 114-15 ("The sentencer . . . may determine the weight to be given to relevant mitigating evidence."). The state complies with the eighth amendment by providing *a fair vehicle* by which the sentencer may effectively consider relevant mitigating evidence.

For example, in *Boyde v. California*, the defendant claimed that evidence he won a dance contest in prison demonstrated an absence of future dangerousness--a factor that Boyde argued could not be given effect under California's death penalty statute. Nonetheless, Boyde presented this evidence as an aspect of his good character, and the Court held that the jury could give effect to such evidence insofar as it, like other good character evidence, demonstrated the crime to be an aberration from an otherwise good character. *Id.* at 383 n.5. The jury did not have what was arguably the most direct vehicle for giving mitigating effect to Boyde's evidence--a future dangerousness question--and could not have given independent mitigating effect to this evidence if it also believed that the evidence did not extenuate the gravity of Boyde's crime or show it to be an aberration. Nonetheless, the Court found no eighth amendment violation because the jury had *a fair vehicle* by which it could give effect to that evidence.

Penry v. Lynaugh, 492 U.S. 302 (1989), arguably departs from the Court's prior cases because the Court found a violation of *Lockett* despite the fact that constitutionally relevant evidence was not excluded from sentencer consideration as a matter of law--either by instruction to disregard or by complete

irrelevance to the state's sentencing inquiries. As the majority recognized, Penry's retardation was relevant in a mitigating fashion to the question whether he acted deliberately and with the reasonable expectation that death would result, because the proffered mitigating evidence reflected that retardation caused Penry to act impulsively. *Penry v. Lynaugh*, 492 U.S. at 322. Indeed, precisely to the extent Penry's crime was attributable to this aspect of his retardation, the evidence also militated against an affirmative answer to the first special issue because impulsive conduct is the antithesis of deliberate conduct.

Nonetheless, the other major mitigating force of Penry's evidence of retardation and childhood abuse was that, as a result, he could not learn from his mistakes. This aspect of his retardation was logically relevant to the second special issue, but *only* in an aggravating fashion. *Id.* at 323-24. Indeed, the *greater* the extent to which the capital murder was attributable to Penry's inability to learn from his mistakes, the stronger the aggravating weight of that evidence. The *Penry* Court assessed whether, not how, the jury could give mitigating effect to this aspect of Penry's evidence, and it concluded that the jury's inability to give it *any* mitigating effect violated the eighth amendment. To the extent the *Penry* holding reflects that the jury could give *no* mitigating effect to this significant aspect of his retardation, it is consistent with prior precedent. The Court should reaffirm this view of *Penry* and *Lockett* as the appropriate accommodation of the competing constitutional commands: while a defendant is entitled to proffer any character or background evidence for its relevance to valid sentencing concerns, the eighth amendment is violated only if evidence that is probative of a reduced culpability or an absence of future dangerousness cannot result in a sentence less than death under the sentencing inquiries provided by the state.

C. Texas reasonably guides sentencer discretion through special issues that incorporate traditional sentencing concerns.

As the Court expressly recognized in *Jurek v. Texas*, 428 U.S. 262, 269-74 (1976), Texas did not respond to *Furman* by enacting a capital sentencing statute with enumerated aggravating and mitigating circumstances. Rather, the Texas Legislature adopted special issues[17] to which a wide range of evidence, aggravating and mitigating, is relevant and admissible. A death sentence is imposed only after the jury unanimously finds, beyond a reasonable doubt, that all special issues submitted should be answered in the affirmative. For this reason, the cases are few in which a defendant's proffered evidence will be unable to affect the sentencing decision in a mitigating fashion. The Texas special issues are, thus, "significantly different" in nature and scope from the three mitigating circumstances at issue in *Lockett v. Ohio*, 438 U.S. at 612-13, which instead are similar to three of Florida's seven statutory mitigating factors. Compare *id.* (Appendix to Opinion of the Court),[18] with *Proffitt v. Florida*, 428 U.S. 242, 248 n.6 (1976).[19]

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[17] The full text of the special issues is set forth *supra* at page 2.

[18] The three mitigating circumstances provided by the Ohio statute were:

> (1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

The special issues "guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individualized offender before it can impose a sentence of death." *Jurek v. Texas*, 428 U.S. at 274. They do so in an eminently reasonable manner--by requiring the jury to express its moral judgment about the offense and the offender in a manner directly corresponding to society's concerns in the administration of the criminal law, rather than by attempting to delineate a few of the factors relevant to those concerns. The Texas special issue format generally and the future dangerousness issue specifically are not moral only in a "utilitarian" sense. See *Graham v. Collins*, ___ U.S. ___, 113

> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such a condition is insufficient to establish the defense of insanity.

Ohio Rev. Code Ann. § 2929.04(B) (1975).

[19] Florida's statutory mitigating circumstances included the following:

> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (c) The victim was a participant in the defendant's conduct or consented to it.
>
> * * *
>
> (e) The defendant acted under extreme duress or under the substantial domination of another person.

Fla. Stat. Ann. § 921.141(6) (Supp. 1976-77).

S. Ct. at 922 (dissenting opinion). Even the four dissenting justices in *Blystone* recognized as much.

> These questions require the jury to do more than find facts supporting a legislatively defined aggravating circumstance. Instead, by focusing on the deliberateness of the defendant's actions and his future dangerousness, the questions compel the jury to make a moral judgment about the severity of the crime and the defendant's culpability. The Texas statute directs the imposition of the death penalty only after the jury has decided that the defendant's actions were sufficiently egregious to warrant death.

Blystone v. Pennsylvania, 494 U.S. at 322 (dissenting opinion of Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.).

Except in atypical cases such as *Penry*, in which the defendant's crime is attributable to a uniquely severe permanent handicap that also shows she will continue to commit criminal acts of violence, any dichotomy between "looking forward" to assess future dangerousness and "looking back" to the defendant's culpability is of little import. The jury is not given a crystal ball so that it can "look forward" to see whether the defendant will pose a future danger. Rather, it is provided with evidence about the defendant's past--her background, her character, her record, and the circumstances and gravity of her crime--and its decision is based upon such factors. The special issues thus permit the jury to express a reasoned and moral response to evidence about the defendant, her culpability, and her capacity for rehabilitation.

Indeed, the Court in *Adams v. Texas*, 448 U.S. 38 (1980), expressly recognized that jurors retain sufficient

discretion under the special issue format that their general views on capital punishment can permissibly influence the sentencing decision.

> [J]urors in Texas must determine whether the evidence presented by the State convinces them beyond reasonable doubt that each of the three questions put to them must be answered in the affirmative. In doing so, they must consider both aggravating and mitigating circumstances, whether appearing in the evidence presented at the trial on guilt or innocence or during the sentencing proceedings. Jurors will characteristically know that affirmative answers to the questions will result in automatic imposition of the death penalty. . . . In essence, Texas juries must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. *Jurek v. Texas*, 428 U.S. 262, 271 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) This procedure is not an exact science, and the jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths.

Adams v. Texas, 448 U.S. at 46. The same rationale also serves to explain why, consistent with the special issues and jury instructions, the jury's view about the propriety of the death penalty in a *particular* case can affect its answers to the special issues in the permissible sense acknowledged in *Adams*. Just as

the jury in a balancing state "gives effect" to mitigating evidence by considering and weighing it when determining the ultimate sentencing issues, a Texas capital jury "gives effect" to mitigating evidence by determining whether, in light of all the evidence, the special issues should be answered "yes" beyond a reasonable doubt. Under the Texas scheme, therefore, any evidence that possesses mitigating relevance to a single special issue can, if credited and accorded sufficient weight by the sentencer, raise a reasonable doubt. Consistent with constitutional requirements, all such evidence is permitted to affect the sentencing decision in a mitigating fashion and is within the jury's "effective reach." *Graham v. Collins*, ___ U.S. at ___, 113 S. Ct. at 902.

II. THE SPECIAL ISSUES PERMITTED THE JURY TO GIVE MITIGATING EFFECT TO ALL SUBSTANTIAL PROFFERED ASPECTS OF JOHNSON'S YOUTH, IN COMPLIANCE WITH THE EIGHTH AMENDMENT.

All members of this Court agree that under the Texas capital-sentencing issues, youth is a factor that the sentencer may view as mitigating and that can affect the sentencing decision in a mitigating fashion. *Graham v. Collins*, ___ U.S. at ___, ___, 113 S. Ct. at 902, 925. Johnson's claim, thus, is merely that the instructions and special issues limited *how* the jury could give effect to evidence pertaining to his relative youth. As discussed *supra* at 20, this allegation does not state a claim for relief under the eighth amendment.

In the alternative, because Johnson's claim is not that evidence was excluded from the sentencing process, the appropriate standard for review is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a

way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. at 380.

> Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition. This "reasonable likelihood" standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent upon how a single hypothetical "reasonable" juror could or might have interpreted the instruction.

Id.

Application of this standard indulges a presumption that the jury will not choose, from among plausible interpretations of the charge, an interpretation that will transform the presentation of mitigating evidence into "'a virtual charade'"--unless the text of the instructions compels it to do so. *Boyde*, 494 U.S. at 383-84, quoting *California v. Brown*, 479 U.S. at 542.

> [J]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in light of all that has taken place at trial likely to prevail over technical hairsplitting.

Boyde v. California, 494 U.S. at 380-81. Further, in assessing whether there is a reasonable likelihood that a particular jury felt constrained by its instructions to ignore mitigating evidence, the evidence should be assessed as it actually was proffered at trial.[20] *Boyde*, 494 U.S. at 382 n.5. Any other approach would allow the mere *possibility* of inhibition to provide a basis for overturning a death sentence--a result the Court expressly sought to avoid when it adopted this standard of review. *Id.* at 380. It also would permit death sentences to be overturned, not because the sentencer was precluded from giving mitigating effect to evidence proffered by the defendant as the basis for a sentence less than death, but because of mitigating inferences belatedly urged by the death-sentenced inmate as a basis for reversal.

Finally, application of the "reasonable likelihood" standard should take into account the inherently "moral" nature of the jury's decision. That is, where consideration of aggravating and mitigating evidence leads the sentencer to believe that a death sentence is appropriate, even the presence of twenty different vehicles by which the jury may "give effect" to mitigating evidence probably will not result in a life sentence. On the other hand, if the jury's weighing of mitigating and aggravating evidence persuades it that a life sentence is appropriate, a single vehicle by which the defendant's evidence can affect the sentencing decision in a mitigating fashion will be sufficient to allow it to do so. This is as true with respect to Texas' former special issue format as it is with respect to the capital-sentencing schemes adopted by other states. Because the special issues are the ultimate issues on the question of capital

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20 The Court refused to consider Boyde's argument that evidence he won a prison dance contest demonstrated an absence of future dangerousness because Boyde did not proffer the evidence for that purpose at trial. Rather, the evidence was proffered as an aspect of Boyde's good character, and the Court confined its review to the purpose for which it was proffered. *Boyde v. California*, 494 U.S. at 382 n.5.

punishment, the jury is "likely to weigh mitigating evidence as it formulates these answers in a manner similar to that employed by capital juries in 'pure balancing' States." *Franklin v. Lynaugh*, 487 U.S. at 182 n.12.

Penry preceded *Boyde* and, accordingly, did not purport to apply the "reasonable likelihood" standard. To the extent *Penry* indicates that a different inquiry is appropriate--whether "a reasonable juror *could well have believed* that there was no vehicle" for giving mitigating effect to relevant evidence--it has been expressly overruled. *Boyde v. California*, 494 U.S. at 379, quoting *Penry v. Lynaugh*, 492 U.S. at 326 (emphasis added by *Boyde* Court). Additional language in *Penry* also is inconsistent with the "reasonable likelihood" formulation. Rather than assessing whether the first and third special issues *permitted* the jury to give mitigating effect to Penry's evidence of retardation and childhood abuse, the Court appeared to engage in a form of sufficiency review. Regarding special issue one, the majority stated that "[a] rational juror . . . *could have concluded*" that Penry deliberately killed the deceased. *Penry v. Lynaugh*, 492 U.S. at 322 (emphasis added). Similarly, with respect to the third issue, it concluded that, if a juror believed Penry's evidence showed him to be less culpable, it "would not *necessarily* diminish the 'unreasonableness' of his conduct" in response to provocation, if any, by the deceased. *Id.* at 324 (emphasis added).

The Court should in this case make clear that the appropriate inquiry is not whether the defendant's evidence *necessarily would have* raised a reasonable doubt in the minds of jurors, but whether it was *capable* of raising a reasonable doubt on any of the punishment issues. The mere fact that the state adduces evidence that is constitutionally sufficient under the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), or that the defendant's evidence does not entitle him to a "no" answer as a matter of law, does not mean that the jury is precluded from

giving effect to the mitigation.[21] This formulation is equivalent to stating that the jury in a balancing state that provides for a life sentence if mitigating factors outweigh aggravating factors cannot "give effect" to the mitigating evidence unless it outweighs aggravation as a matter of law, or the fact that there are five aggravating factors precludes the sentencer from giving effect to a single mitigating circumstance. Rather, the jury's reasoned moral response is expressed through the weighing process itself.

Here, there is no reasonable likelihood that the jury interpreted the punishment-phase instructions to prohibit it from considering, weighing, or giving mitigating effect to Johnson's evidence of relative youth. The trial court instructed the jury that its answers to the following issues would determine Johnson's punishment:[22]

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[21] In performing sufficiency review, a court does not sit as a thirteenth juror, asking whether it believes the evidence was sufficient. *Jackson v. Virginia*, 443 U.S. at 318-19. To preserve the jury's role as "weigher of the evidence", the evidence is construed in the light most favorable to the government,with all conflicts resolved in favor of the verdict. *Id.* at 319. The fact that a rational jury could have chosen to give the defendant's evidence little weight, and might not have believed it at all, does not mean that it was required to do so. Thus, the Court of Criminal Appeals' decisions when performing sufficiency review under *Jackson* do not support Johnson's claim that the special issues precluded the jury from giving effect to his mitigating evidence.

[22] The jury was expressly instructed that its answers to the special issues would determine Johnson's punishment:

> You are further instructed that if the jury returns affirmative or "yes" answers to all the Issues submitted, this Court shall sentence the Defendant to death. If the jury returns a negative or "no" answer to any Issue submitted, the Court shall sentence the Defendant to life in prison.[146]

> Was the conduct of the Defendant, Dorsie Lee Johnson, Jr., that caused the death of the deceased, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> * * *
>
> Is there a probability that the Defendant, Dorsie Lee Johnson, Jr., would commit criminal acts of violence that would constitute a continuing threat to society?

JA 148-49. In determining the answers to these issues, the jury was expressly authorized to consider, all of the evidence admitted at both phases of the trial, "whether aggravating or mitigating in nature". JA 147. Johnson's evidence of relative youth, as proffered, possessed mitigating relevance to the special issues. As in *Graham v. Collins*, the evidence was not placed beyond the "effective reach" of the jury, *id.* at ___, 113 S. Ct. at 902, and Johnson was thus afforded the individualized sentencing guaranteed by the eighth amendment.

No major mitigating aspect of youth, either generally or as shown by the evidence in Johnson's case specifically, falls outside the scope of the special issues. Johnson mentions as salient features of "youthfulness" a tendency toward impulsive conduct, susceptibility to influence, and struggle to establish one's own identity. As this Court observed, "'minors often lack the experience, perspective, and judgment' expected of adults. . . ." *Eddings v. Oklahoma*, 455 U.S. at 115, quoting *Bellotti v. Baird*, 443 U.S. 662, 635 (1979).

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[146] JA 146.

Any tendency of a young capital murderer to act impulsively is relevant in a mitigating fashion to the question whether his conduct was committed deliberately and with the reasonable expectation that the death of the deceased would result. Indeed, impulsive conduct is the antithesis of deliberate conduct. Further, because special issue one also requires the jury to examine whether the defendant reasonably expected that his actions would result in death, the jury is permitted to consider, as mitigating, evidence showing that the defendant did not appreciate the meaning and consequences of his conduct. Consistent with the Constitution, special issue one requires that there be a nexus between these qualities and the crime itself. If a youthful defendant tends to act impulsively because of his age, but the crime was deliberate rather than impulsive, that aspect of youth does not reflect a reduced culpability. While such evidence may very well play to the sympathies or emotions of jurors, it does not reflect a reduced culpability because the crime is not fairly attributable to any tendency toward impulsive behavior. *Penry v. Lynaugh*, 492 U.S. at 319.

Here, the jury's affirmative answer to special issue number one does not indicate that the jury was precluded from giving mitigating effect to these aspects of Johnson's youth.[23] Rather, it merely reflects that the jury either did not credit the evidence or gave it insufficient weight to raise even a reasonable doubt on that issue.[24] Indeed, given the calculated and

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[23] Any impulsive behavior and lack of awareness by Johnson was proffered in connection with his claimed use of drugs prior to the offense. R. XV 385-86, JA 47-48.

[24] The prosecutor did not argue that Johnson's evidence was irrelevant to the deliberateness question but, rather, that the evidence was self-serving and less than credible. "You see, he then told the police officers what he did. If he is acting under diminished capacity, he wouldn't be able to calculate and plan and do everything. But he told it with great particularity about what he did and how he did it and why he did it and who was there and why he -- what he did and said to them. . . . He killed him on purpose, on purpose. No diminished capacity. He deliberately did it." R. XV 469, JA 88.

premeditated nature of the crime, the fact that Johnson executed the deceased pursuant to a plan to eliminate witnesses, and his amendment of the plan while waiting for a customer to leave (that is, he decided to ask for a gallon jug of orange juice because there was none on the shelves), the jury quite rationally rejected any suggestion that the crime was attributable to youthful impulsiveness. Beyond this, any tendency of Johnson to act impulsively because of his relative youth has no constitutional relevance to his culpability for commission of capital murder.

The foregoing qualities, along with susceptibility to influence and immature judgment, can also be given mitigating effect under the second special issue. It is the malleability of young people that indicates an amenability to positive change--an aspect of youthfulness that possesses obvious mitigating relevance to the future dangerousness question. Further, because a young person's lack of experience may make him vulnerable to negative influences, his conduct may reflect those influences rather than his character. Accordingly, where the criminal conduct of a juvenile is attributable to such influence, the conduct will not bear on his character and propensities in the same that an older person's conduct generally does.

Johnson also asserts that, during jury selection, the prosecutor encouraged jurors to blur the line between intentional and deliberate conduct. The record reflects, however, that the prosecutor emphasized that the two inquiries were different and that the first special issue could not automatically be answered "yes" based upon a finding of intentional conduct at the guilt-innocence phase. *E.g.*, R. IX 3512-13; 3707-09; 3665-66; XI 4600-01. The prosecutor used the following example as an illustration: "[T]he Legislators intended for there to be two separate thought processes; therefore, they deliberately used two different words." R. XI 4601. In any event, given the premeditated nature of Johnson's own crime, the examples he cites, Petitioner's Brief at 4 n.1, have no bearing on the question before the Court.

In addition, precisely to the extent criminal conduct is *attributable* to a transitory condition, or to an extraordinary circumstance or stress, that evidence indicates a lack of future dangerousness. Such mitigating relevance is both obvious and logical. Indeed, much of the evidence mentioned by the Court of Criminal Appeals in *Jurek v. State*, 522 S.W.2d 934 (Tex. Crim. App. 1975), falls within this category.

> In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand.

Id. at 939-40; see also *Jurek v. Texas*, 428 U.S. at 266-68 (mitigating factors included Jurek's relative youth of twenty-two years, the fact that he had been drinking prior to the offense, and good deeds reflecting a good character). Channeling sentencer consideration of such evidence through the future dangerousness inquiry appropriately guides the jury's consideration of evidence

offered in mitigation without limiting what factors the sentencer may consider as mitigating.[25]

Recognition that juvenile offenders may lack the judgment expected of adults does not explain why youthful offenders are viewed as less culpable for that reason. Adult criminals who are not amenable to rehabilitation clearly exercise a judgment that is unlike that exercised by law-abiding citizens. That *difference* in judgment, which equally may be termed a lack of the judgment society expects of adults, is anything but mitigating--despite the efforts of some capital murderers to claim that being a sociopath is mitigating. *E.g.*, *Demouchette v. Collins*, No. 92-5914, *cert. denied*, ___ U.S. ___, 113 S. Ct. 27 (1992); see *Graham v. Collins*, ___ U.S. at ___, 113 S. Ct. at 915 (Thomas, J., concurring). Rather, the defendant's prior criminal conduct may properly be treated as aggravating evidence at sentencing. See 28 U.S.C. § 944(i) (directing United States Sentencing Commission to ensure that defendants with prior convictions would received enhanced punishments).

What is mitigating about youth, other then a tendency toward impulsive behavior that is fully encompassed by the deliberateness inquiry, is that young people may not have had the life experience that provides a basis for the exercise of appropriate judgment.[26]

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[25] The fact that "future dangerousness" is an aggravating factor in Oklahoma does not mean that *Eddings* stands for the proposition that the second special issue is inadequate to permit consideration of mitigating evidence. Rather, the *Eddings* Court found eighth amendment error because the sentencing court expressly held that the law required it to disregard mitigating evidence. 455 U.S. at 112-13.

[26] Murder, of course, does not fall within a moral "gray" area. "It is . . . absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards." *Stanford v. Kentucky*, 492 U.S. 361, 374 (1989) (opinion of Scalia, J.,

> [Y]outh is mitigating because insufficient experience has not allowed judgment and self-control to fully develop, but the limitations attributable to youth are all necessarily transitory.

Graham v. Collins, 950 F.2d 1009, 1031 (5th Cir. 1992) (en banc). Youth is an inherently transitory "time and condition of life," *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (footnote omitted), and it necessarily follows that the disabilities of youth diminish and disappear with the passage of time.[27] Indeed, society expects young persons to mature as they age and

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joined by the Chief Justice and White and Kennedy, JJ.). This is particularly true with respect to murders committed for the purpose of witness elimination, such as the murder Johnson committed as a nineteen-year-old adult.

[27] See, *e.g.*, Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 U.C.S.A. L. Rev. 503, 508 & n.13, 538 (1984) (a child may have difficulty choosing among options, but an adult will not; children usually are not considered to be culpable because of their age, but this changes once the child becomes an adult); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. Rev. 821, 911 (1988) (the progression from child to adult in maturity and experiencing time is the same as the progression from children to adults in developing responsibility for making blameworthy choices); Alison R. Faltersack, *Stanford v. Kentucky, The Minimum Age for the Maximum Penalty--Death*, 23 J. Marshall L. Rev. 453, 466 & n.94 (1990) (many believe these disabilities of youth begin to transform into a self-reliant responsible age of adulthood during early adolescence, including the ability to plan for the future while becoming accountable to society); Lawrence A. Vanore, *The Decency of Capital Punishment for Minors; Contemporary Standards and the Dignity of Juveniles*, 61 Ind. L.J. 757, 779 (1986) (when minors become adults, they obtain more privileges as well as responsibility and culpability in matters of law); Glenn M. Bieler, *Death Be Not Proud: A Note on Juvenile Delinquent Punishment*, 7 N.Y.L. Sch. J. Hum. Rts. 179 (1990) (adolescence is the period of physical and psychological development from the onset of puberty to maturity, the transitional period between childhood and adulthood, and a stage of life lasting roughly from age 12 to age 19).

acquire life experience. Where the perspective provided by life experience probably will not lead to the responsible exercise of judgment that society expects of adults, and in the context of criminal law that it *demands* of adults, then the poor judgment and criminal conduct are not fairly attributable to the mitigating aspects of youth. Rather, they simply are attributable to the aggravating factor of bad character.

The record in this case demonstrates that the jury could give mitigating effect to evidence pertaining to Johnson's relative youth when it answered the second special issue, just as the Court of Criminal Appeals stated in *Jurek v. Texas*. All aspects of Johnson's youthfulness were proffered to show that his criminal conduct was inconsistent with his character, and it was this issue that was joined at the punishment phase. Johnson's father, Dorsie Johnson, Sr., described his son as a young man who, in "trying to step into manhood," associated with a bad crowd that involved him in the use of drugs. R. XV 360-62, JA 26-27. According to Mr. Johnson, it was the drugs that temporarily changed Johnson, altering his reasoning and control; when locked away from the drugs and the friends that influenced his lawless behavior, Johnson would act in conformity with his background and character. R. XV 360-63, JA 26-28. "[H]e got the background and what it takes to be a decent person. Now, he's had both sides of it. He knows what it takes to make him a different person." R. XV 362, JA 27.

Precisely to the extent that Johnson's criminal conduct was attributable to a lack of life experience and immature judgment, it equally indicated that he would not pose a future danger. His father's testimony, if believed by the jury, established that Johnson's experiences would provide the basis for responsible and mature exercise of judgment in the future. At the time of Johnson's capital-sentencing hearing, he plainly possessed life experiences and a perspective that most people will not attain in a lifetime. According to Mr. Johnson, his son told him, "'Daddy, I wish I could change it. I wish it never had happened. I wish I had listened more closely to what you said

and the way I was raised. I just got off, got into that stuff. It got the best of me.'" R. XV 365, JA 30. Had the jury credited evidence that Johnson's crime was attributable to the limitations of youth, it necessarily would have concluded that Johnson was capable of learning and did learn appropriately from his experiences; he would not in the future be susceptible to the drugs and negative influences of so-called friends that supposedly led to his violent conduct and, for that reason, would not pose a future danger.

Thus, all proffered aspects of Johnson's youth, which he now claims to reflect a reduced culpability beyond the scope of the special issues, possess mitigating relevance to the special issues. Consistent with the punishment-phase instructions, the jury could give mitigating effect to Johnson's proffered evidence in the precise manner advocated by defense counsel. As the punishment-phase summations of defense counsel and the prosecutor reflect, special issue number two ultimately required the jury to decide what kind of person Johnson really was. The prosecutor characterized Johnson as a "cold-blooded, heartless, premeditated murderer" who acted in conformity with a violent character and would continue to do so. R. XV 415-16, 420-24, JA 53-56. Defense counsel, on the other hand, urged that Johnson was a young man who was lured into the use of drugs by a bad crowd and whose violent conduct was inconsistent with his character. R. XV 449-51, 459, JA 73-75, 80-81. The prosecutor did not argue that Johnson's evidence was irrelevant to punishment generally or to the special issues specifically but, rather, maintained that it was not credible and did not accurately reflect Johnson's character.

The record in this case fully bears out the reasoning of the *en banc* court of appeals in *Graham v. Collins*:

> [W]hatever is mitigating about youth tends to lend support to a "no" answer to the second special issue, and its tendency to do so is essentially

> proportional to the degree to which the jury concludes such factors were influential in the defendant's criminal conduct. The greater the role such attributes of youth are found to have played in the defendant's criminal conduct, the stronger the inference that, as his youth passes, he will no longer be a danger to society.

950 F.2d at 1031. Here, the jury's decision as to which portrait of Johnson was accurate was an undeniably reasoned and moral one, and through the second special issue it could express its reasoned moral response to the evidence, including Johnson's mitigating evidence. Consistent with the eighth amendment, the sentencing decision was based upon the jury's consideration and weighing of particularized factors pertaining the individual offense and the individual offender.

Despite its recognition that a transitory condition such as youth possesses mitigating relevance to the future dangerousness issue, the *Graham* dissent nonetheless theorized that a jury might view youth as aggravating: "It is no answer to say youth is fleeting; it may not be fleeting enough, and a sufficiently young defendant may have his continuing youth considered under the second issue as aggravating, not mitigating." *Graham*, ___ U.S. at ___, 113 S. Ct. at 925. Johnson also argues that his youth is "dual-edged" because the jury had to consider a longer period of time during which he might be violent. This argument is rather like saying that a jury would treat a female capital murderer more harshly than her male counterpart, viewing her gender as an aggravating factor because women actuarially have a longer life expectancy than men and, hence, have more years within which to commit criminal acts of violence. There is no reasonable likelihood that a jury, particularly a jury inclined to leniency based upon temporary mitigating qualities of youth, would go to such lengths to treat the evidence as aggravating.

Even the prosecutor acting as an advocate did not urge the jury to ignore mitigating evidence for this reason. Rather, he argued that the unlikely possibility that Johnson might change twenty or forty years in the future (long after any disabilities of *youth* would have terminated) did not warrant a negative answer to the second special issue. R. XV 473, JA 91. The purported aggravating edge to youth, if any, is negligible, whether viewed in isolation or in comparison to the mitigating relevance of youth to the special issues. More significantly, the problem in *Penry* was not that the jury could choose whether to view certain evidence as aggravating or mitigating; rather, a substantial aspect of Penry's mental retardation and childhood abuse, an inability to learn from his mistakes, was not relevant to the first special issue and was relevant to the second special issue *only* as an aggravating factor. Here, in contrast, to the extent Johnson's evidence was relevant to traditional sentencing concerns and to his culpability, the jury was permitted to consider, weigh, and give mitigating effect to that evidence. The Constitution requires no more.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Criminal Appeals of Texas should be affirmed.

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